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ALEXANDER L. STEVAS,
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No. 82-912

IN THE

Supreme Court of the United States

October Term, 1982

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

vs.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, PACIFICA
FOUNDATION, HENRY A. WAXMAN,

Appellees.

On Appeal From the United States
District Court for the Central District of California

MOTION TO DISMISS OR AFFIRM

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Appellees.

On Appeal From the United States
District Court for the Central District of California

MOTION TO DISMISS OR AFFIRM

Appellees League of Women Voters of California, Pacifica Foundation, and Henry Waxman respectfully move to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States District Court for the Central District of California, on the grounds that the appeal has not been timely taken and that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the District Court is reported at 547 F.Supp. 379 (C.D. Cal. 1982) and is reprinted in Appendix A to the Jurisdictional Statement (J.S. App. 1a-20a).

QUESTIONS PRESENTED

1. Whether a notice of appeal, filed after entry of the District Court's judgment but while appellant's motion to alter or amend the judgment pursuant to Fed. Rule Civ. Proc. 59 remained pending in the District Court, is valid.

2. Whether the District Court correctly applied established precedents in ruling that 47 U.S.C. § 399, which completely prohibits editorializing by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting, violates the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press

2. 47 U.S.C. § 399, as amended by the Public Broadcasting Amendments Act of 1981, Section 1229, Pub. L. No. 97-35, 95 Stat. 730, provides:

No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office.

3. Supreme Court Rule 11.3 (1980 revision) provides: The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is

rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

STATEMENT OF THE CASE

Appellees brought this lawsuit to vindicate their respective First Amendment rights to express and to receive the views of noncommercial broadcasters on issues of public interest and importance.¹ The District Court agreed that those fundamental rights are directly and unjustifiably violated by 47 U.S.C. § 399, which completely prohibits editorializing by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting. As the court found, § 399 outlaws speech that lies at the very heart of the First Amendment's protections, and the government interests purportedly served by the statute are far too speculative to support such an unprecedented abridgment of the Constitution's guarantees of freedom of speech and freedom of the press.

¹ Appellee Pacifica Foundation is a non-profit, educational corporation which owns and operates noncommercial educational broadcasting stations in five major markets in the United States. Appellee League of Women Voters of California is a non-profit, non-partisan organization whose purpose is to promote political responsibility through the informed and active participation of citizens in government. Appellee Henry Waxman is a United States Congressman and is a regular listener and viewer of noncommercial radio and television broadcasts. J.S. App. 6a.

Statutory Background

Significant federal funding of noncommercial broadcasting began with the Educational Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, which authorized the former Department of Health, Education & Welfare ("HEW") to distribute \$32 million over a five-year period for the construction of educational television broadcasting facilities. An additional infusion of federal monies followed in 1967 when Congress, buoyed by the success of the Facilities Act and wanting to aid the further development of the promising noncommercial broadcasting industry, enacted the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 368 (codified at 47 U.S.C. §§ 390 et seq.). The Act had three separate components: Title I authorized appropriations of \$38 million over the next three years to continue HEW's program of construction and acquisition grants begun under the Facilities Act, expanding it to include noncommercial radio broadcast facilities, as well; Title II authorized \$9 million for the creation of a mechanism to provide much-needed funding for cultural and educational programming so that the new noncommercial broadcasting facilities could be productively utilized; and Title III authorized \$500,000 to finance a study of instructional television to be conducted by HEW.

In establishing a comprehensive framework for the funding of educational programs, Congress took pains to ensure that there would be no government interference with programming decisions and that local stations would remain absolutely free to determine for themselves what they should or should not broadcast. S. Rep. No. 222, 90th Cong., 1st Sess. 11, *reprinted in* [1967] U.S. Code Cong. & Ad. News 1772, 1782. Accordingly, the Act created the Corporation for Public Broadcasting ("CPB"), an independent, non-profit private corporation, to disburse federal and other

funds to local stations and other entities for the production and/or acquisition of educational programming. In this manner, Congress was able "to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control." 47 U.S.C. § 396(a)(7).

To guarantee CPB's insulation from government supervision and control, Congress erected numerous barriers to any potential political influences and promulgated strict limitations on permissible CPB activities. For example, the Public Broadcasting Act expressly declares that CPB "will not be an agency or establishment of the United States Government" (47 U.S.C. § 396(b)), and it prohibits any federal agency or employee from exercising any "direction, supervision, or control" over either CPB or any of its grantees (47 U.S.C. § 398(a)), or over the content of any public telecommunications programs or services (47 U.S.C. § 398(c)). Moreover, CPB is governed by a bi-partisan board of directors (47 U.S.C. § 396(c)(1)); no board members may be employees of the United States (47 U.S.C. § 396(c)(2)); no political tests may be used in CPB personnel actions and decisions (47 U.S.C. § 396(e)(2)); and CPB may not contribute to or otherwise support any political party or candidate for election to public office (47 U.S.C. § 396(f)(3)). In addition, CPB itself may not produce, schedule, or disseminate programs directly to the public (47 U.S.C. § 396(g)(3)(B)); it may not own or operate any broadcast station, network, or interconnection facility (47 U.S.C. § 396(g)(3)(A)); and it must adhere strictly to a standard of "objectivity and balance in all programs . . . of a controversial nature" (47 U.S.C. § 396(g)(1)(A)). Lastly, CPB distributes its grants to eligible local stations strictly according to an objective, nondiscretionary formula. J.S. App. 13a.

Virtually all of these safeguards were contained in the Senate-approved version of the 1967 Act. The question of editorializing by noncommercial stations did not arise until the House Committee was considering the Senate bill. Then, "[o]ut of abundance of caution" (H.R. Rep. No. 572, 90th Cong., 1st Sess. 20, *reprinted in* [1967] U.S. Code Cong. & Ad. News 1799, 1810), and despite the acknowledgment by the amendment's leading proponent that "anyone who has had any experience in the past 6 years knows there has not been the slightest control of any kind exercised by the Federal Government in making grants [in the noncommercial educational television field]" (113 Cong. Rec. 26407 (remarks of Rep. Springer)), the House for the first time adopted a prohibition against editorializing by noncommercial broadcasting stations, whether or not they received any federal funding.² The Senate acquiesced in the addition of this provision, which in its original form read:

No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

47 U.S.C. § 399 (1967).

²There is absolutely no basis for appellant's assertion that "[w]hen the original act was passed, it was generally assumed that all public broadcasting stations would receive government funding." J.S. at 4. Indeed, appellant's only alleged support for this claim — the unsuccessful amendment offered by Representative Devine to distribute \$5 million equally among all existing noncommercial stations — actually demonstrates that just the opposite was the case: The amendment was proposed precisely because the Public Broadcasting Act as enacted did not contain any assurances or provisions for funds to be distributed to all local stations. See 113 Cong. Rec. 26415-16. Moreover, while the Committee Reports indicate Congress' expectation that CPB would endeavor to distribute its funds fairly throughout various geographic regions of the country, they also evidence Congress' understanding that not all local noncommercial broadcasting stations would receive CPB funding. See, e.g., H.R. Rep. No. 572, 90th Cong., 1st Sess. 17, *reprinted in* [1967] U.S. Code Cong. & Ad. News 1799, 1807.

Proceedings Below

Appellees filed the instant action challenging the constitutionality of § 399 on April 30, 1979, and shortly thereafter moved for summary judgment. In response, the Department of Justice, as attorney for the FCC, notified the District Court that because the Department had concluded that the prohibition against editorializing violated the First Amendment, it could not and would not defend the constitutionality of the statute. As Attorney General Civiletti explained:

After careful consideration, we have concluded that Section [399] violates the First Amendment guarantees of freedom of speech and freedom of the press by restricting the ability of public broadcasting stations to comment on matters of public interest. While not every restriction on expression is necessarily unconstitutional, such restrictions must serve some compelling state interest. We have not been able to identify any compelling governmental interest served by Section [399] which would justify the statute's prior restraint on speech. Furthermore, even if the Department of Justice could fashion an argument that the statute serves a compelling government interest, the statute would still be constitutionally defective on grounds of overbreadth since public broadcasting stations receiving no federal funds are covered. Finally, we have concluded that there are less restrictive means to achieve the suggested purposes of the statute.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the challenged statute.

Letter from Attorney General Benjamin R. Civiletti to Senate Majority Leader Robert C. Byrd, October 11, 1979 (filed

as Exhibit "A" to Plaintiffs' Memorandum in Support of Plaintiffs' Motion to Disallow Filing of Senate's Motion to Dismiss and attached hereto as App. A, at 1a-2a).

Although the Department of Justice therefore offered no further defense of the editorializing ban at that time, the Senate Legal Counsel, appearing as *amicus curiae* pursuant to 2 U.S.C. § 288e(a), sought and obtained dismissal of the lawsuit on the ground that the District Court was without jurisdiction to decide the issues presented in the absence of a justiciable case or controversy. While the expedited appeal from the District Court's order of dismissal was pending in the Ninth Circuit Court of Appeals, however, the Department of Justice under the new Attorney General reversed its position and announced that it would both enforce and defend the challenged statute.³

The District Court therefore vacated its order of dismissal and recalendared appellees' motion for summary judgment. Then, after briefing was completed and only three days before oral argument was set to be heard, Congress amended § 399 to its present form. The scope of the prohibition against editorializing was limited to those noncommercial broadcasting stations that receive grants from CPB, thereby freeing the more than 800 public television and radio stations that had been receiving no federal funds from the statute's blatantly unconstitutional restrictions.

³Although the FCC, as the agency charged with administering and enforcing the provisions of the Communications Act, was and continues to be the nominal defendant and appellant in this lawsuit, the Commission informed the District Court that it was taking no position on the constitutional question presented in this case, noting that the arguments advanced by the Justice Department in defense of § 399 did not necessarily reflect the positions taken by the Commission in other areas of policy. See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment 1-2 n*.

Because appellees' First Amendment rights continued to be violated by § 399's restraint on freedom of speech, however, they renewed their motion for summary judgment, now focusing their challenge solely on the statutory ban on editorializing by CPB-funded noncommercial broadcasters. On August 6, 1982, the District Court entered an order granting summary judgment in favor of appellees, declaring 47 U.S.C. § 399's editorializing prohibition unconstitutional, enjoining the FCC from enforcing the prohibition, and awarding appellees their costs and reasonable attorneys' fees. (J.S. App. 21a-22a.) Finding that the right of noncommercial broadcasters to express their views on public issues was entitled to the full panoply of First Amendment protections, the District Court concluded that the government had failed to establish that § 399's ban on editorializing was narrowly tailored to serve a compelling interest. (J.S. App. 17a-18a.) The court determined that in light of the diverse sources of funding for noncommercial broadcast stations, the numerous safeguards built into the federal funding system to ensure that noncommercial broadcasters remain free of government control, and the fairness doctrine's added protections against the one-sided presentation of issues of public importance, the evidence simply did not support the alleged fear of government control of the noncommercial broadcast media. (J.S. App. 12a-15a.) Similarly, the court concluded that the desire to ensure the balanced presentation of opinion by CPB-funded noncommercial broadcasters was not sufficiently compelling to justify § 399's ban on protected speech. (J.S. App. 15a-17a.) Having rejected both of the purported interests asserted by the government in support of the statute, the District Court held that 47 U.S.C. § 399 violated the First Amendment insofar

as it prohibited noncommercial broadcasters from editorializing.⁴

On August 16, 1982, appellant filed a timely Motion to Alter or Amend the Judgment pursuant to Fed. Rule Civ. Proc. 59(e), on the ground that the award of attorneys' fees was barred by sovereign immunity because it was not made in accord with the procedures or limitations of the Equal Access to Justice Act, 28 U.S.C. § 2412. *See* App. B, at 3a-4a. With that motion still pending before the District Court, the notice of appeal to this Court was filed on September 3, 1982. (J.S. App. 23a.) Almost two months later, on November 1, 1982, the District Court disposed of the Rule 59(e) motion, granting the relief requested by appellant and striking its previous award of attorneys' fees from the judgment.⁵ No subsequent notice of appeal was filed, and the government's appeal was docketed in this Court on December 1, 1982. Upon appellees' motion, the time for filing this Motion to Dismiss or Affirm was extended to January 20, 1983.

⁴Because the District Court concluded that neither of the justifications offered by the government in defense of the statute were sufficient to support its restriction on free speech rights, the court did not rule upon appellees' additional contentions that § 399 was not the least restrictive means of achieving its alleged objectives, that it was not narrowly tailored to its asserted purposes, and that it violated the Equal Protection guarantee of the Fifth Amendment.

⁵The District Court then entertained and took under submission appellees' motion for an award of reasonable costs and attorneys' fees.

MOTION TO DISMISS

Appellees move to dismiss the instant appeal on the ground that the government failed to file its notice of appeal within the time for filing set forth in Supreme Court Rule 11.3. Because "the requirement of a timely notice of appeal is 'mandatory and jurisdictional,'" *Griggs v. Provident Consumer Discount Company*, 51 U.S.L.W. 3413, 3414 (Nov. 30, 1982) (quoting *Browder v. Director, Illinois Dept. of Corrections*, 434 U.S. 257, 264 (1978)), the government's appeal must be dismissed for lack of jurisdiction.

Supreme Court Rule 11.3 (1980 revision) states that "if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties . . . runs from the date of the denial of rehearing or the entry of a subsequent judgment." This rule codifies "the consistent practice in civil and criminal cases alike[, which] has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending." *United States v. Dieter*, 429 U.S. 6, 8 (1976). The effect of a motion for reconsideration, therefore, is to "suspend . . . the finality of the judgment . . . until the District Court's [disposition] . . . of the motion . . . restore[s] it." *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445 (1974). See generally *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 149-50 (1980) (state's motion for partial retrial rendered nonfinal the district court's entire judgment, so that time for filing notice of appeal began to run on date of denial of motion); *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952); *Department of Banking v. Pink*, 317 U.S. 264 (1942).

In the instant case, the order granting summary judgment in favor of appellees was entered on August 6, 1982. The government then filed a timely Rule 59 motion to alter or amend, which suspended the finality of the District Court's judgment until November 1, 1982, the date on which the court effectively granted the government's motion and modified its previous judgment. In accordance with Supreme Court Rule 11.3 and its well-established common law precedents, the time for filing a notice of appeal thus commenced on November 1, 1982. During the subsequent thirty-day filing period,⁶ no notice of appeal was filed by the government.

The government's failure to file the requisite notice within the thirty-day filing period defeats jurisdiction in this Court. The government's premature notice of appeal, filed on September 3, 1982, prior to the date on which the District Court's judgment became final, was of no consequence. As this Court recently held in construing the analogous Fed. Rule App. Proc. 4(a)(4), which governs the time for filing a notice of appeal from a district court to a court of appeals, a premature notice of appeal, filed prior to the disposition of a motion to alter or amend, is without effect. *Griggs v. Provident Consumer Discount Company*, *supra*. It is "as if no notice of appeal were filed at all. And if no notice of

⁶The period for filing a notice of direct appeal to the Supreme Court pursuant to 28 U.S.C. § 1252 is thirty days from the entry of the interlocutory or final order, judgment, or decree. 28 U.S.C. § 2101(a).

appeal is filed at all, the Court . . . lacks jurisdiction to act." 51 U.S.L.W. at 3414.⁷

⁷As Professor R. Moore has noted:

While [Fed.] Rule [App. Proc.] 4 is applicable only to appeals from district courts to courts of appeals, its provisions as to the effect of timely post-judgment motions on the time for appeal are based upon rules of reason developed by the case law; and the principle behind them is applicable to appeals to the Supreme Court. The principle is that a post-judgment motion that has the potential for modifying or setting aside the judgment destroys its finality for purposes of appellate review, until the motion is acted upon by the court that rendered the judgment.

The effect of a motion for rehearing on the time for seeking Supreme Court review has been dealt with specifically by the 1980 revision of the Court's Rules.

12 *Moore's Federal Practice* ¶607.04[12], at 9-30 to 9-31 (2d ed. 1982) (footnotes omitted).

MOTION TO AFFIRM

Alternatively, appellees move to affirm the judgment of the District Court declaring 47 U.S.C. § 399's prohibition against editorializing by CPB-funded noncommercial broadcasters unconstitutional under the First Amendment. The District Court's careful and well-reasoned conclusion so clearly follows from the longstanding and unambiguous precedents of this Court that plenary review of the decision below is unwarranted.

The needlessness of further briefing and argument before this Court is demonstrated not only by the soundness of the District Court's decision, but by the fallacious arguments proffered by appellant in its Jurisdictional Statement. Those contentions — many of which are being raised for the first time on appeal — are both unsupported by the record in this case and contrary to established First Amendment doctrine.

A. The District Court Properly Held That the Prohibition Against Editorializing Can Survive First Amendment Scrutiny Only if It Serves a Compelling Government Interest and Is Narrowly Tailored to That End.

As the District Court found, the speech prohibited by 47 U.S.C. § 399 lies at the heart of the First Amendment's protections. (J.S. App. 9a.) By categorically proscribing the expression of the views of CPB-funded noncommercial broadcasters on issues of public importance, and thereby depriving the public of access to information and ideas so critical to our system of self-government, § 399 offends the most basic principles of freedom of speech and freedom of the press. Accordingly, the District Court correctly held that the statute could withstand the exacting scrutiny called for under the First Amendment only if the government could demonstrate that § 399's absolute ban on editorializing is

the most narrowly drawn regulation necessary to further a compelling state interest. *E.g.*, *Citizens Against Rent Control v. City of Berkeley*, 102 S.Ct. 434, 436 (1981); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535, 537, 540 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 786 (1978); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Buckley v. Valeo*, 424 U.S. 1, 14-15, 25 (1976); *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Having been unable to persuade the District Court of the existence of any compelling government interests that could justify § 399's restriction on the noncommercial broadcaster's freedom of expression, appellant has decided to try a different tack in this Court and now argues that because the editorializing prohibition applies only as a condition to the receipt of certain government grants, a less stringent standard of judicial review is warranted.⁸

⁸Appellant's "spending power" argument is being raised for the first time on appeal, and for that reason alone is not entitled to this Court's consideration. In the District Court, the government unsuccessfully attempted to demonstrate only that § 399 served two different compelling government interests. Not once did appellant ever suggest that a lower standard of review under the First Amendment was called for because § 399's restriction on expression was imposed as a condition to the receipt of federal funds. See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment; Defendant's Supplemental Memorandum on Amendment of Section 399.

Significantly, appellant has apparently now conceded that the concerns to which § 399's ban on editorializing are allegedly addressed do not rise to the level of compelling government interests. See, e.g., J.S. 8 ("the court also seriously underestimated the *substantial and legitimate* interest served by the provision against editorializing"); *id.* at 12-13 ("[t]hat prohibition serves at least two *substantial* government interests"); *id.* at 19 ("the prohibition of editorializing serves a *highly important* government interest") (emphases added). Thus, unless this Court agrees with appellant's belated argument that traditional First Amendment analysis does not apply because § 399's prohibition is conditioned on receipt of a grant from CPB, the decision below must be affirmed.

The government's argument that the First Amendment's traditional compelling interest test is inappropriate rests on a fundamental mischaracterization of both the nature of a CPB grant and the scope of § 399's prohibition. First, the grants that local stations receive for programming from the Corporation for Public Broadcasting are not "federal funds."⁹ Moreover, § 399 does not, as appellant suggests, simply restrict the manner in which the noncommercial broadcaster may spend the grant it receives. Rather, the statute imposes an outright restraint on what the broadcaster may do or say with *any* of its funds. Thus, this is not just another instance of Congress limiting the use of appropriated funds, and the examples upon which the government relies, *see* J.S. 10, are wholly inapposite to the reality of this case.¹⁰

⁹It bears emphasizing that the individual noncommercial licensees to whom § 399's prohibition applies receive grants from CPB — an independent, private corporation — and not from the government. Indeed, Congress established the Corporation precisely in order to isolate the distribution of funds to noncommercial broadcasting stations from the normal appropriations process and to remove all such decisions from government authority. Accordingly, both HEW and the Department of Commerce have themselves ruled that CPB grants to local noncommercial stations are private, rather than federal funds, and CPB has consistently taken the position that the grants it distributes do not constitute "federal financial assistance." *See, e.g.,* 44 Fed. Reg. 30898, 30907-08 (May 29, 1979); 42 Fed. Reg. 57286, 57287 (Nov. 1, 1977). *Cf.* 36 Comp. Gen. 221 (1956); 28 Comp. Gen. 54 (1948).

¹⁰For instance, the government suggests that § 399's editorializing ban is analogous to 18 U.S.C. § 1913's prohibition against lobbying with appropriated moneys and 22 U.S.C. § 1461's restriction on the International Communication Agency's dissemination of information within this country. J.S. 9-10. However, all of the government's examples relate either to statutory provisions directed at *government* agencies or employees, or to restrictions placed on what other persons may do with the *federal funds* they receive. It is an altogether different matter for Congress to prescribe what private noncommercial broadcasters may do with their own private funds.

Indeed, appellant concedes that its examples are inapposite, but maintains that a lesser standard of review is nonetheless called for because § 399 "does not seek to regulate private speech but rather attempts to prevent misuse of public funds." J.S. 10-11 (emphasis added). The critical point, of course, is that — regardless of its "intent" — § 399 *does* regulate private speech, and for that reason traditional First Amendment strict scrutiny must be applied. *See, e.g., Carey v. Brown*, 447 U.S. 455, 464-65 (1980) ("[E]ven the most legitimate goal may not be advanced in a constitutionally impermissible manner."). Furthermore, given § 399's historical prohibition against editorializing even by those stations that receive no federal funding, the "intent" of the statute is highly questionable, as well. *See* note 13 *infra*.

More important, the government's argument demonstrates a material misunderstanding of basic constitutional law. This Court has never countenanced the conditioning of a grant of federal funds on the recipient's surrender of its fundamental liberties, particularly its First Amendment right of free expression. See *Elrod v. Burns*, *supra*, 427 U.S. at 361; *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926). The reach of the Spending Power does not extend so far as to permit the government to place a price tag on the noncommercial broadcaster's exercise of its freedom of speech. As the Court of Appeals for the D.C. Circuit declared with respect to this precise issue:

Clearly, the existence of public support does not render the licensees vulnerable to interference by the federal government without regard to or restraint by the First Amendment. For while the Government is not required to provide federal funds to broadcasters, it cannot condition receipt of those funds on acceptance of conditions which could not otherwise be constitutionally imposed.

Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (en banc).

The flaw in appellant's argument becomes manifest upon even the most cursory consideration of its implications. Under the theory the government posits, for example, the prohibition against editorializing could presumably extend to newspapers and periodicals, for they, too, receive a valuable government subsidy in the form of reduced postal rates. See 39 C.F.R. § 111.5 (1982); *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976). Or, to take the factual scenario tendered by the government itself, the college professor who receives a small government grant to conduct research in

a certain area could be told what *not* to study in the remainder of his research. See J.S. 10 n.10. In fact, it follows from appellant's specious reasoning that a university which accepts federal funding to help defray some of its operating expenses could be told by the government what subjects it could and could not teach. The examples are limitless, as would be the encroachment of the federal government into the protected activities of this country's citizens if appellant's theory had any basis in constitutional doctrine.¹¹

B. The Government Interests Purportedly Served by 47 U.S.C. § 399 Cannot Justify the Statute's Prohibition Against Editorializing.

Even under the "balancing" test proposed by appellant, § 399's prohibition against editorializing cannot pass constitutional muster, for the suppression of the noncommercial broadcaster's right to express its views on issues of public importance is an unnecessary and overly restrictive response to the concerns the statute allegedly seeks to address. The government has suggested two such rationales for the editorializing ban: insulating CPB-funded noncommercial sta-

¹¹Appellant also suggests that "[b]ecause of the scarcity of broadcast frequencies (see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969)), the government may take reasonable steps to allocate this scarce public resource fairly, even though comparable measures would not be permitted with respect to the print media or other forms of expression." J.S. 12 n.11. As the District Court concluded, however, although that statement may be true as a general proposition, in this case the government has not shown why this or any other special characteristic of the broadcast medium justifies § 399's prohibition against editorializing. See J.S. App. 10a-11a. Indeed, the special application of the First Amendment in the broadcasting context has always been invoked to *maximize* the number and diversity of views expressed over the airwaves, not to *limit* the subjects and issues that the broadcaster may discuss. Moreover, in the present case — unlike those cited by appellant (see J.S. 12 n.11) — there is no clash among the sometimes-competing First Amendment rights of the individual speaker, the broadcaster, and the listening public; each of those interests is furthered by the noncommercial broadcaster's exercise of its right to editorialize.

tions from political influence and preventing the use of "public funds" to propagate controversial views. Neither purported justification, however, can withstand even a modest level of review.¹²

As the District Court found, the hypothetical fear that permitting CPB-funded noncommercial broadcasters to editorialize would somehow subject them to government control is entirely unsupported and speculative. See *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Williams v. Rhodes*, 393 U.S. 23 (1968); *NAACP v. Button*, 371 U.S. 415 (1963). The protective shield provided by CPB's independent structure and nondiscretionary grant-making procedures, the diverse funding sources for non-commercial broadcasting stations, and the fairness doctrine's requirement that coverage of public issues be balanced, all combine to ensure that CPB-funded stations will not be vulnerable to any potential government attempt to use them as propaganda organs. J.S. 14a-15a. And although appellant seeks to cast doubt upon the validity of the District Court's decision by quibbling over the degree to which these safeguards can guarantee air-tight insulation from political pressures (J.S. 15-19), the government in any event offers no explanation of how § 399's prohibition against edito-

¹²Appellant's argument is sprinkled with suggestions that the courts must defer to the judgment of Congress in assessing the substantiality of the asserted government interests and in reviewing the constitutionality of § 399. See, e.g., J.S. 12, 15, 19, 21. However, as this Court has often admonished:

Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978).

rializing remedies the supposed threat of interference that might exist.¹³

¹³ It is most unlikely that Congress, in enacting § 399, was actually motivated by the government interests now being put forward by appellant in defense of the statute. To be sure, Congress wished to ensure that the noncommercial broadcasters would be free from any federal control over programming, and to that end it established the Corporation for Public Broadcasting and constructed numerous statutory safeguards to protect both CPB and the local stations from any possibility of political influence. But there is every indication in the legislative history of the Public Broadcasting Act that Congress was motivated by an entirely different — and illegitimate — purpose in passing § 399: the desire to suppress potentially critical public comment. As the leading proponent of the ban on editorials explained, "There are some of us who have very strong feelings because they have been editorialized against." Hearings on H.R. 6736 and S. 1160 Before House Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess. 641 (remarks of Rep. Springer). See also 113 Cong. Rec. 26391 (1967) (remarks of Rep. Keith: "It is conceivable that [a certain noncommercial television broadcast] could . . . have adversely affected my candidacy for re-election."); *id.* (remarks of Rep. Joelson: "Those of us in public office are in a position where newspapers, radio, or TV stations can say anything they wish about us. . . . Therefore, the right of editorializing should be very, very carefully scrutinized."). This troubling legislative history has not escaped the attention of courts and commentators. See, e.g., *Community-Service Broadcasting*, *supra*, 593 F.2d at 1128 n.25 (Robinson, J., concurring); Lindsey, *Public Broadcasting: Editorial Restraints and The First Amendment*, 28 Fed. Com. B. J. 63, 81 (1975); Toohey, *Section 399: The Constitution Giveth and Congress Taketh Away*, 6 Educ. Broadcasting Rev. 31, 34 (1972) ("[T]he purpose of Section 399 was clear: to prevent Congress from creating a monster that might someday turn on its creator. Therefore, to achieve its own self-protective ends Congress simply legislated away a significant part of educational broadcasters' right of free speech.").

That the prohibition against editorializing was not adopted to protect against government control of noncommercial programming is further demonstrated by the fact that at the time of § 399's enactment, and until its amendment fourteen years later in response to this lawsuit, the prohibition applied to the hundreds of noncommercial broadcasters that received absolutely no federal funding. Even today, as appellant acknowledges (J.S. 16 n. 14), the statute's restriction covers only those stations that receive grants from CPB, but not those receiving the more discretionary funding from other federal agencies, such as the Departments of Education and Commerce, the National Endowment for the Arts, and the National Endowment for the Humanities. Cf. *Carey v. Brown*, *supra*, 447 U.S. at 465 & n.9.

Moreover, to allow the government to silence the broadcaster's editorial voice in order to prevent the theoretical possibility of government interference with the free expression of that very voice would stand the First Amendment on its head. The constitutionally permissible response to any such fear is not to close down the broadcaster's studio, but "to push the doors open to all viewpoints." *Community-Service Broadcasting*, *supra*, 593 F.2d at 1134 n. 62 (Robinson, J., concurring). The dominant theme in First Amendment law is that the remedy for any perceived imbalance in the "marketplace of ideas" is more speech, not less speech. *See, e.g., First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 790-91; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). As the appellant FCC itself cogently concluded in rejecting the call for a prohibition on editorializing by commercial broadcasters:

Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available, for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation.

In re Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1253-54 (1949).

Finally, appellant's contention that § 399's ban on editorializing is necessary to obviate any constitutional problems that might inhere in using taxpayers' money to promote the noncommercial broadcaster's editorial views can readily

be dismissed.¹⁴ One need look no farther than this Court's endorsement of the public financing of presidential election campaigns in the face of the constitutional challenge in *Buckley v. Valeo*, *supra*, to confirm that where financial assistance is provided, not to abridge, but to facilitate the exercise of free speech, the funding of private political views does not violate the First Amendment rights of taxpayers who might disagree with those views. *See* 424 U.S. at 90-93. Indeed, in rejecting the plaintiffs' First Amendment claims in that case, this Court specifically adverted to the provision of aid to noncommercial broadcasting as an example of legislation that sought to enhance First Amendment values by promoting "a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive." *Id.* at 93 n.127 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Because editorializing by noncommercial broadcasters likewise furthers "the First Amendment goal of producing an informed public capable of conducting its own affairs," *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 392, federal funding of that expression would pose no constitutional problem.¹⁵

¹⁴Why the District Court never discussed this alleged government interest (*see* J.S. 19) is quite obvious: Appellant never raised it. And why it was not argued to the court below is quite obvious, too: There is not a word in the legislative history to indicate that Congress was actually motivated by this concern in enacting § 399, nor is there any basis for asserting that the funding of noncommercial broadcasters' editorial expression would create First Amendment problems.

¹⁵Appellant's reliance on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), is misplaced, for that case held only that an individual could not be required "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235. It is quite a different matter, of course, to assert that the government may not spend its funds to support an endeavor with which some taxpayers may disagree. As this Court noted in *Buckley v. Valeo*, *supra*, every appropriation made by Congress uses public money in a manner to which some taxpayers object, so the existence of that disagreement does not in and of itself pose any constitutional dilemma. 424 U.S. at 90-92. *Cf. Frothingham v. Mellon*, 262 U.S. 447 (1923). Furthermore, it is a giant leap from the remedy applied in *Abood*, which did not infringe on anyone's right to express his political views, to § 399's complete suppression of the noncommercial broadcaster's editorial opinions. *Cf. First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 794 n.34.

At best then, 47 U.S.C. § 399 is an overly restrictive means of responding to the purely hypothetical possibility of government interference with the CPB-funded noncommercial broadcaster's editorial decisions. At worst, it is an ill-disguised attempt by Congress to suppress potentially critical public comment. In either event, the statute imposes restraints on protected political expression far beyond those that are essential to further any purported compelling government interests. The District Court was therefore plainly correct in declaring § 399's prohibition against editorializing unconstitutional under the First Amendment.

CONCLUSION

For the reasons stated above, appellees move this Court to dismiss the appeal or, in the alternative, to affirm the judgment of the District Court for the Central District of California.

Respectfully submitted,

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CENTER FOR LAW IN THE

PUBLIC INTEREST

Attorneys for Appellees

APPENDIX A

Letter to Senator Robert C. Byrd From Benjamin R. Civiletti, Attorney General

[October 11, 1979]

PB: KOlesker:bgg
82-12C-69

Tel: 633-3495

Honorable Robert C. Byrd
Senate Majority Leader
United States Senate
Washington, D. C. 20510

Dear Senator Byrd:

In *League of Women Voters of California, et al. v. Federal Communications Commission* (C.D. Cal., No. CV 79-1562-MML (PX)), the plaintiffs challenge, on First and Fifth Amendment grounds, the constitutionality of Section 399(a) of the Public Broadcasting Act of 1967, 47 U.S.C. §399(a), which prohibits all public broadcasting stations from editorializing and supporting or opposing political candidates. I wish to inform the Senate that the United States will not defend the constitutionality of the statute.

After careful consideration, we have concluded that Section 399(a) violates the First Amendment guarantees of freedom of speech and freedom of the press by restricting the ability of public broadcasting stations to comment on matters of public interest. While not every restriction on expression is necessarily unconstitutional, such restrictions must serve some compelling state interest. We have not been able to identify any compelling governmental interest served by Section 399(a) which would justify the statute's prior restraint on speech. Furthermore, even if the Department of Justice could fashion an argument that the statute serves a compelling government interest, the statute would still be

constitutionally defective on grounds of overbreadth since public broadcasting stations receiving no federal funds are covered. Finally, we have concluded that there are less restrictive means to achieve the suggested purposes of the statute.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the challenged statute. The Federal Communications Commission has informed us that it agrees that the statute cannot be defended successfully in its present form.

The Department has filed an Answer to Plaintiffs' Complaint to protect your interests should you decide to defend this suit, and the Court has established a briefing schedule. If the Department can be of further assistance to you in explicating the reasons for declining to defend this case or if you or your staff believe it would be helpful to discuss the options that the Senate may wish to pursue, Thomas S. Martin, Deputy Assistant Attorney General, Civil Division, will be pleased to discuss the matter further. He can be reached at 633-3309.

Sincerely,

BENJAMIN R. CIVILETTI
Attorney General

APPENDIX B

**Notice of Defendant's Motion to
Alter or Amend Judgment**

In the United States District Court
for the Central District of California

League of Women Voters of
California, et al.,

Plaintiffs,

v.

Federal Communications
Commission,

Defendant.

No. CV 79-1562-
MML(PX).

Notice of
Defendant's Motion
to Alter or Amend
Judgment

Hearing:

September 20, 1982
10:00 a.m.

TO THE ABOVE-NAMED PARTIES AND THEIR
ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 20, 1982, at 10:00 a.m., or as soon thereafter as defendant may be heard, defendant will bring on for hearing before the Honorable Malcolm M. Lucas, its Motion to Alter or Amend Judgment pursuant to Rule 59(e), Fed.R.Civ.Pro., on the ground that the award to plaintiffs of reasonable attorneys' fees is barred by sovereign immunity because the award was not made in accord with the procedures or limitations of the

Equal Access to Justice Act, 28 U.S.C. § 2412. This motion is supported by a memorandum of points and authorities.

Dated: August 16, 1982

Respectfully submitted,

J. PAUL McGRATH

Assistant Attorney General

STEPHEN S. TROTT

United States Attorney

STEPHEN D. PETERSEN

Assistant United States Attorney

/s/ Paul Blankenstein

PAUL BLANKENSTEIN

/s/ Judith F. Ledbetter

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